The Gender Recognition Act 2004

1 The initial view of Scottish Government is that applicants for legal gender recognition should no longer need to produce medical evidence or evidence that they have lived in their acquired gender for a defined period. The Scottish Government proposes to bring forward legislation to introduce a self-declaratory system for legal gender recognition instead.

Agree

If you want, you can give reasons for your answer, or make comments. :

2 Should applicants to the proposed gender recognition system in Scotland have to provide a statutory declaration confirming they know what they are doing and intend to live in their acquired gender until death?

Yes

If you want, you can give reasons for your answer or make comments.: 

3 Should there be a limit on the number of times a person can get legal gender recognition?

No

If you want, you can give reasons for your answer or make comments.: 

4 If the Scottish Government takes forward legislation to adopt a self-declaration system for legal gender recognition, should this arrangement be open:

A. only to people whose birth or adoption was registered in Scotland, or who are resident in Scotland?

If you want, you can give reasons for your answer or make comments.: 

This is a difficult question to answer by ticking one of the two boxes. We would advocate for the first option (only open to people whose birth or adoption was registered in Scotland, or are resident in Scotland), as long as the definition of ‘resident’ would be wide enough to include individuals who are present in Scotland and seeking asylum.

It could be said that the second option (open to everyone) is easiest and most consistent with the general (and most welcome) approach in favour of equality of treatment that is being advanced by the Scottish Government. Indeed, it may be that the Scottish Government would advocate for this option, given how the Equal Marriage conversion provisions were extended beyond Scottish Civil Partnerships to cover English/Welsh civil partnerships and all qualifying overseas relationships. The issue that we foresee with this option, however, is that individuals from outwith Scotland may make use of these provisions in the erroneous belief that a Scottish order would be recognised in their home state. It is true that warnings can be made, but our experience as lawyers is that people rarely read the warnings and can end up in a situation where they find themselves in a more difficult position legally than they had envisaged. This has certainly been our experience of the Equal marriage provisions (above- see article by Rachael Kelsey in Jordans International Family Law Journal Issue 1 of 2018).

5 The Scottish Government proposes that people aged 16 and 17 should be able to apply for and obtain legal recognition of their acquired gender. Doyou agree or disagree?

Agree

If you want, you can give reasons for your answer or add comments.: 

We would hope that this would be uncontroversial, from a child rights perspective.

6 Which of the identified options for children under 16 do you most favour?

Option 5 – applications by capable children

If you want, you can give reasons for your answer, add comments, or describe your preferred option if none of the options given reflects your views.: 

We would dismiss options 1 & 4.

We agree that there is a careful balance to be struck here and can see some merit in option 2, where there is a court based process that is not restricted by age and that the child or young person is in control of. It also allows a welfare based decision to be taken, which it could be thought justified and appropriate.

The disadvantage of option 3 is that it has the potential to give individuals with PRRs too much control over a decision that is clearly a profoundly personal matter for the child/young person.

Option 5 is the most intellectually coherent in terms of a classic child rights perspective, but it may be considered that it places an inappropriate burden on the individual who is assessing capacity. We wonder therefore whether an additional step could apply to such applications, modelled on the Irish court based approach- to require two certificates covering the matters identified in para 4.20 of the Consultation Document.
Marriage and Civil Partnership

7 Should it be possible to apply for and obtain legal gender recognition without any need for spousal consent?

Yes

If you want, you can give reasons for your answer or add comments.: 

8 Civil partnership is only available to same sex couples. This means that the civil partners cannot remain in their civil partnership if one of them wishes to obtain a full Gender Recognition Certificate.

Yes

If you want, you can give reasons for your answer or add comments.: 

9 Should legal gender recognition stop being a ground of divorce or dissolution?

Yes

If you want, you can give reasons for your answer or add comments.: 

Other aspects of the 2004 Act

10 Are any changes to section 22 (prohibition on disclosure of information) necessary?

No

If you answered Yes, describe the changes you consider are needed.: 

11 Should a person who has been recognised in their acquired gender under the law of another jurisdiction be automatically recognised in Scotland without having to make an application?

Yes

If you want, you can give reasons for your answer or add comments.: 

Non-binary people

12 Should Scotland take action to recognise non-binary people?

Yes

If you answered No, and if you want, you can give reasons for your answer.: 

13 If you answered Yes to Question 12, which of the identified options to give recognition to non-binary people do you support? You can select more than one option.


If you want, you can give reasons for your answer, add comments or, if you think none of Options 1 to 6 is suitable, describe your preferred option.: We would welcome progressing comprehensive recognition of non-binary people. We recognise that a lot of work would be required and appreciate the various resourcing challenges that exist. It does seem to us that option 5 is inadequate however (and we see no real benefit to money being spent on option 2, when no legal benefits arise).

14 At paragraph 7.26. and in Annex J we have identified the consequential legal impacts if non-binary people could obtain legal gender recognition using the proposed self-declaration system.

No

If you answered Yes, describe the impacts you have identified.: 

Conclusion

15 Do you have any comments about, or evidence relevant to:

No

If you answered Yes, add your comments or evidence.: 

Do you have any further comments about the review of the Gender Recognition Act 2004?

No

If you answered Yes, add your comments:

About You

What is your name?

Name: Rachael Kelsey

What is your email address?

Email: [redacted]

Are you responding as an individual or an organisation?

Organisation

What is your organisation?

Organisation: SKO Family Law Specialists

If you are responding as an organisation and want to tell us more about your organisation’s purpose and its aims and objectives, you can do so here.

We are Scotland’s largest niche family law practice. We advise across the family law spectrum. We are known for our specialism in acting for LGBTI individuals in family law matters. We acted in the first same sex adoption in Scotland; the first same-sex divorce in the UK and the first same sex cohabitation claim in Scotland. We are regularly called upon to lecture and train lawyers and lay people on the particularities that arise when working with LGBTI people.

Where are you resident?

Scotland

Publish your consultation response. Please indicate your publishing preference:

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